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level on a channel using an FFT at regular, unchanging, short term intervals, e.g., every several milliseconds. (See Naegel et al., column 11, line 62 through column 12, line 1.)

More specifically, Naegel et al. does not teach an initial prescribed period of time over which to search to find an acceptable noise level in a channel as required by applicant's claim 8. Additionally, Naegel et al. does not teach to reduce the prescribed time and then to search again over the new reduced time period, as is also required by applicant's claim 8. Instead, Naegel et al. appears to simply search over a fixed period of time that is as short as possible.

The foregoing difference appears to arise from a difference of philosophy between applicant and Naegel et al. Applicant's arrangement is looking for the longest continuous regularly recurring period of time for which a channel has an acceptable noise level. Such a channel can then be assigned for use over the duration that it is expected to have an acceptable noise level. Indeed, applicant has specifically recited in his specification at page 3, lines 1-3, that "advantageously, the spectrum analyzers employed typically maintain a history of the channel power, which permits the selection of the channel to avoid known periodic noise problems". This is a basis of support for applicant's claim 8.

Naegel et al. appears to take the opposite approach. It seems that Naegel et al. is looking in real time to determine the when a channel has an unacceptably high noise level and thus is not available for use. As soon as the noise level is reduced to an acceptable level, the channel is made available again for use. There is no notion of a period of time over which it can be known that the noise on the channel will be acceptably low, and thus the channel can be regularly used for that period.

Also, as indicated in applicant's prior response, Jones et al. teaches away from employing a spectrum analyzer of the type taught in applicant's claim, which is required to perform the necessary monitoring over time periods. Instead, Jones et al. teaches to use a cheaper spectrum management allocation unit, base upon statistics. (See page 64, lines 21-25 and page 62, lines 33 to page 63, line 5.) Thus, there is no discrete history-over-time measurements made and stored by Jones et al. on which a decision over a shorter time period could be based. Applicant, however, specifically recited in his specification at page 3, lines 1-3, that "advantageously, the spectrum analyzers employed

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typically maintain a history of the channel power, which permits the selection of the channel to avoid known periodic noise problems". This is a basis of support for applicant's claim 8.

Since, Jones et al. teaches away from incorporating a device necessary to implement applicant's invention, applicant's invention cannot be obvious from a combination of Jones et al. and Naegel et al., even if Naegel et al. taught the device necessary to implement applicant's invention that was lacking in Jones et al.—which applicant is not admitting. This is because it would be improper to combine Naegel et al. with Jones et al., for to do so would render Jones et al. unsatisfactory for at least one of its intended purposes, since requiring the necessary device in Jones et al. would ruin one of the advantages taught for the Jones et al. arrangement. In other words, combining Naegel et al. with Jones et al. would render Jones et al. unsatisfactory for at least one of its intended purposes. Thus, as clearly explained in M.P.E.P. 2143.01, there is no suggestion to make combine Naegel et al. with Jones et al. as proposed by the Office Action.

Consequently, even if reducing the prescribed period was taught by Naegel et al.—which applicant is not admitting and indeed has shown to be an incorrect suggestion—nevertheless, a rejection based on a combination of Jones et al. with Naegel et al. cannot be supported since Jones et al. teaches away from including the equipment allegedly taught by Naegel et al. that would be necessary to implement such a combination. Instead, it seems that the basis of such a suggestion must be improper hindsight from applicant's own teaching.

Therefore, applicant's claim is allowable over the combination Jones et al. and Naegel et al. under 35 U.S.C. 103(a).

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Conclusion

It is respectfully submitted that the Office Action's rejections have been overcome and that this application is now in condition for allowance. Reconsideration and allowance are, therefore, respectfully solicited.

If, however, the Examiner still believes that there are unresolved issues, he is invited to call applicant's attorney so that arrangements may be made to discuss and resolve any such issues.

In the event that an extension of time is required for this amendment to be considered timely, and a petition therefor does not otherwise accompany this amendment, any necessary extension of time is hereby petitioned for, and the Commissioner is authorized to charge the appropriate cost of such petition to the **Lucent Technologies Deposit Account No. 12-2325.**

Respectfully,

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